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BROS. ENTERTAINMENT INC. and NS
7 PICTURES, INC,

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

10
11 ROBERT J. MARDEROSIAN, an
individual; ARON M.
12 MARDEROSIAN, an individual;
TWELVE SIXTY, LLC, a California
13 limited liability company,

14 Plaintiffs,

15 v.

16 WARNER BROS. ENTERTAINMENT
INC., a Delaware corporation; NS
17 PICTURES, INC., a California
corporation; MARCO E. BELTRAMI,
18 an individual; PIANELLA MUSIC
INC., a California corporation; DOES
19 1-10, inclusive,

20 Defendants.
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Case No. 2:17-cv-01062 CAS (GJSx)

**NOTICE OF MOTION AND
MOTION OF WARNER BROS.
ENTERTAINMENT INC. AND NS
PICTURES, INC. TO DISMISS
PLAINTIFFS' CLAIMS FOR
STATUTORY DAMAGES AND
ATTORNEYS' FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Declaration of Julia J. Bredrup and
[Proposed] Order filed concurrently
herewith]

The Honorable Christina A. Snyder

Date: May 1, 2017
Time: 10:00 a.m.
Ctrm.: 8D

1 **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 1, at 10:00 a.m., or as soon thereafter
3 as this matter may be heard, in the courtroom of the Honorable Christina A. Snyder,
4 located in the United States Courthouse, 350 West 1st Street, Courtroom 8D, 8th
5 Floor, Los Angeles, CA 90012, Defendants Warner Bros. Entertainment Inc. and NS
6 Pictures, Inc. (collectively, “Warner Bros.”) will and hereby do move this Court
7 pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss with prejudice
8 Plaintiffs’ claim for statutory damages and attorneys’ fees from their Complaint.

9 This Motion is made on grounds that Plaintiffs are not entitled to statutory
10 damages or attorneys’ fees because Plaintiffs failed to register timely the work at
11 issue with the Copyright Office, *see* 17 U.S.C. § 412, and thus their request for
12 statutory damages and attorneys’ fees is barred as a matter of law.

13 This Motion is based on this Notice of Motion, the accompanying
14 Memorandum of Points and Authorities, the Declaration of Julia J. Bredrup filed
15 concurrently herewith, all of the pleadings and other documents on file in this case,
16 all other matters of which the Court may take judicial notice, and any further
17 argument or evidence that may be received by the Court at the hearing.

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1 Pursuant to Local Rule 7-3, counsel for Warner Bros. met and conferred with
2 counsel for Plaintiffs regarding this Motion on March 24, 2017. *See* Declaration of
3 Julia J. Bredrup, ¶ 2. The parties were unable to resolve the issues presented in this
4 Motion. *Id.*

5
6 DATED: April 3, 2017

CALDWELL LESLIE & PROCTOR, PC
LINDA M. BURROW
JULIA J. BREDRUP

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10 By /s/ Linda M. Burrow
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12 Attorneys for Defendants WARNER BROS.
13 ENTERTAINMENT INC. and NS PICTURES,
14 INC.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Robert J. Marderosian, Aron M. Marderosian, and Twelve Sixty LLC (collectively, “Plaintiffs”) claim that Defendants Warner Bros. Entertainment Inc. and NS Pictures, Inc. (collectively, “Warner Bros.”) infringed their copyright in a musical composition and sound recording (collectively, the “Work”) used in the main title theme for the television series *Lucifer*. While the facts will show that Plaintiffs’ claim is meritless, for purposes of this Motion, the Court needs only to consider whether Plaintiffs’ claim for statutory damages and attorneys’ fees should be dismissed, because Plaintiffs failed to timely seek registration of their alleged Work. The facts alleged in the Complaint establish conclusively that Plaintiffs are not entitled to either form of relief.

Under Section 412 of the Copyright Act, statutory damages and attorneys’ fees are available only where a work was registered *prior* to commencement of the alleged infringement, or where registration occurred within three months of the first publication of the work. 17 U.S.C. § 412; *see also Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701-02 (9th Cir. 2008) (reversing statutory damages and attorneys’ fees award based on untimely registration). Plaintiffs did not seek to register the *Lucifer* theme’s musical composition until more than seven months *after* they claim the infringement began, and did not seek to register the sound recording until several months later. Plaintiffs request for attorneys’ fees and statutory damages thus fails as a matter of law. *Id.*

Moreover, because no additional facts could change the fact that Plaintiffs failed timely to seek registration of their alleged Work, any attempt to amend the Complaint to state a claim for statutory damages and fees would be futile, and this Court should dismiss Plaintiffs’ claim for statutory damages and attorneys’ fees with prejudice. *See, e.g., Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (the “general rule that parties are allowed to amend their pleadings . . . does

1 not extend to cases in which any amendment would be an exercise in futility”);
 2 *Jordan-Benel v. Universal City Studios, Inc.*, No. CV-14-5577-MWF (MRWx),
 3 2015 WL 3888149, at **14-15 (C.D. Cal. June 24, 2015) (dismissing request for
 4 statutory damages and attorney’s fees without leave to amend).

5 **II. FACTUAL BACKGROUND**

6 Plaintiffs, brothers Robert and Aron Marderosian, allege they are “renowned
 7 television, video game and motion picture score, soundtrack, and trailer composers
 8 and musical artists.” Complaint (“Compl.”), ¶ 16. Plaintiff Twelve Sixty LLC is
 9 the Marderosian brothers’ loan-out corporation. *Id.*, ¶ 6. Plaintiffs allege that, in
 10 October 2015, Defendants Marco E. Beltrami and his company Pianella Music Inc.
 11 (collectively, “Beltrami”) approached them for help in composing music Beltrami
 12 was planning to submit to Warner Bros. for use as an opening theme for a television
 13 series titled *Lucifer* (the “*Lucifer* Theme”). *Id.*, ¶ 18. After allegedly coming to
 14 agreement with Beltrami on how Plaintiffs would be compensated and credited,
 15 Plaintiffs allegedly agreed to help compose the track. *Id.*, ¶ 19.

16 Plaintiffs allege that, over the next several days, they wrote an original
 17 musical composition entitled “Pay the Price” a/k/a “Being Evil Has A Price” (the
 18 “Composition”). *Id.* ¶ 20. Plaintiffs claim that they recorded the Composition and
 19 provided Beltrami with “an approximately three-and-a-half minute master
 20 recording” (the “Master”), *id.*, “for submission to Warner Bros.” for consideration.
 21 *Id.*, ¶ 21. Plaintiffs allege that the submission of their Work to Warner Bros. and
 22 their agreement that it be used in the *Lucifer* Theme was contingent on Plaintiffs’
 23 “recei[ving] compensation and credit for the creation” of their Work and on
 24 Plaintiffs retaining all of the publishing rights in the Composition and maintaining
 25 sole ownership of the Master. *Id.* Plaintiffs allege that Beltrami failed to inform
 26 Warner Bros. of these terms. *Id.*, ¶ 23.

27 After learning that Warner Bros. selected “Pay the Price” a/k/a “Being Evil
 28 Has A Price,” for use as the *Lucifer* Theme, Plaintiffs claim they engaged in

1 additional negotiations with Beltrami wherein they agreed that the “writers’ portion
 2 of music publishing in the six-second *Lucifer* Theme only—but not the
 3 [Composition as a whole]—could be split five ways for cue sheet purposes only”
 4 and that Plaintiffs allegedly would receive an “on-screen title card credit.” *Id.*, ¶ 25.
 5 Plaintiffs allege, however, that the parties never executed “documentation
 6 memorializing” the terms of this purported agreement. *Id.*, ¶ 26.

7 *Lucifer* premiered on January 25, 2016. *Id.*, ¶ 27. Its first season ran through
 8 April 2016. *Id.* Plaintiffs allege that the *Lucifer* Theme “was and continues to be
 9 used in most if not all episodes of the Series except for its pilot.” *Id.* Plaintiffs first
 10 applied for registration of the Composition with the United States Copyright Office
 11 on August 11, 2016, more than six months after the Series debuted. *Id.*, ¶ 32.
 12 Plaintiffs did not apply for registration of the Master until January 29, 2017. *Id.*
 13 Plaintiffs do not allege that either the Composition or Master has actually been
 14 registered. Nor do they provide copies of the applications for registration they claim
 15 to have filed, which would disclose on their faces the first date of publication.

16 **III. THIS COURT SHOULD DISMISS PLAINTIFFS’ CLAIMS FOR** 17 **STATUTORY DAMAGES AND ATTORNEYS’ FEES**

18 “A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in
 19 the complaint.” *Grant v. Aurora Loan Servs., Inc.*, 736 F.Supp.2d 1257, 1265 (C.D.
 20 Cal. 2010). “To survive a motion to dismiss, a complaint must contain sufficient
 21 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
 22 face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
 23 *Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the
 24 plaintiff pleads factual content that allows the court to draw the reasonable inference
 25 that the defendant is liable for the misconduct alleged.” *Id.* “[A] plaintiff’s
 26 obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than
 27 labels and conclusions, and a formulaic recitation of the elements of a cause of
 28 action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted).

1 “If a plaintiff requests attorney’s fees and statutory damages in the complaint,
 2 courts routinely decide whether such remedies are available under the Copyright Act
 3 on a 12(b)(6) motion.” *Martin v. Walt Disney Internet Grp.*, No. 09-1601-MMA
 4 (POR), 2010 WL 2634695, at *3 (S.D. Cal. June 30, 2010) (granting defendants’
 5 motion to dismiss requests for statutory damages, enhanced damages and attorneys’
 6 fees on copyright claim even though defendants did not seek dismissal of copyright
 7 claim as a whole); *see also Jordan-Benel*, 2015 WL 3888149, at *15 (construing
 8 defendants’ motion to strike requests for statutory damages and attorneys’ fees as a
 9 Rule 12(b)(6) motion to dismiss); *accord Dos Santos v. Telemundo Commc’ns Grp.*,
 10 *LLC*, No. 12-1373 JVS (MLGx), 2012 WL 9503003, at *7 (C.D. Cal. Dec. 19,
 11 2012) (striking request for attorneys’ fees and costs and statutory damages “because
 12 the works were not registered when the infringement began”).

13 **A. Statutory Damages and Attorneys’ Fees are not Available Because**
 14 **Plaintiffs Failed Timely to Seek Registration of Their Work**

15 Statutory damages and attorneys’ fees are only available under the Copyright
 16 Act for “(1) any infringement of copyright in an unpublished work commenced
 17 before the effective date of its registration; or (2) any infringement of copyright
 18 commenced after first publication of the work and before the effective date of its
 19 registration, unless such registration is made within three months after the first
 20 publication of the work.” 17 U.S.C. § 412; *see also Poof Apparel*, 528 F.3d at 701-
 21 02 (reversing award of statutory damages and attorneys’ fees where plaintiff
 22 registered copyright more than three months after the first publication of the alleged
 23 infringing work). Section 412 thus serves two important purposes: incentivizing
 24 copyright owners to register their copyrights promptly and encouraging potential
 25 infringers to first check the copyright database. *See Poof Apparel*, 528 F.3d at 700;
 26 *see also Johnson v. Jones*, 149 F.3d 494, 505 (6th Cir. 1998) (observing that the
 27 policy of encouraging prompt registration “reduce[s] both the search costs imposed
 28 on potential infringers and the enforcement costs borne by copyright owners”).

1 While Plaintiffs seek statutory damages and attorneys’ fees for the alleged
 2 infringement of the Composition and Master, *see* Compl., ¶¶ 41-42, the Complaint
 3 makes clear that they are not entitled to such relief. Plaintiffs purposely avoid
 4 alleging the specific date on which the second episode, the first which used the
 5 *Lucifer* Theme, aired. They further seek to conceal the first dates of publication by
 6 failing to attach their applications for registration to the Complaint, which would
 7 necessarily disclose those dates. Plaintiffs concede, however, that before they were
 8 used in the *Lucifer* Theme, neither the Composition nor the Master was previously
 9 published. *See id.*, ¶¶ 20-21 (describing their composition as a new piece created
 10 specifically for delivery to Warner Bros. “for consideration in the selection of the
 11 main title theme” of *Lucifer*). Plaintiffs further admit that *Lucifer* premiered on or
 12 about January 25, 2016, and that the first season aired *through* April 2016, *id.*, ¶ 27,
 13 all of which occurred *more than three months* before Plaintiffs sought to register
 14 either the Composition or the Master. *Id.*, ¶ 32. Plaintiffs thus concede that they did
 15 not seek to register either the Composition or the Master either before they allegedly
 16 were infringed, or within three months of initial publication, and they are now
 17 precluded from obtaining statutory damages or attorneys’ fees. *See, e.g., Martin*,
 18 2010 WL 2634695, at *4 (dismissing statutory damages and attorneys’ fees claim
 19 where the work at issue was “unpublished and unregistered” when the alleged
 20 infringement began); *Zito v. Steeplechase Films, Inc.*, 267 F.Supp.2d 1022, 1026
 21 (N.D. Cal. 2003) (dismissing claim for statutory damages and attorneys’ fees where
 22 the plaintiff’s work was “unpublished and unregistered before defendants alleged
 23 infringement commenced”).

24 ***B. The Dismissal of Plaintiffs’ Claims for Statutory Damages and***
 25 ***Attorneys’ Fees Should Be With Prejudice***

26 Plaintiffs’ untimely attempt to register the Composition and the Master cannot
 27 be cured by amendment. As a result, any attempt by Plaintiffs to avoid dismissal of
 28 their claims for statutory damages and attorneys’ fees would be futile. This Court

1 should therefore grant Warner Bros.’ motion to dismiss with prejudice and without
2 leave to amend. *See, e.g., Steckman*, 143 F.3d at 1298 (holding that the “general
3 rule” permitting amendment “does not extend to cases in which any amendment
4 would be an exercise in futility or where the amended complaint would also be
5 subject to dismissal”) (citations omitted); *Jordan-Benel*, 2015 WL 3888149, at
6 **14-15 (dismissing plaintiff’s request for statutory damages and attorneys’ fees
7 without leave to amend where plaintiff failed timely to register his works).

8 **IV. CONCLUSION**

9 For the foregoing reasons, Warner Bros. respectfully requests that this Court
10 grant this Motion in its entirety and dismiss Plaintiffs’ claims for statutory damages
11 and attorneys’ fees with prejudice and without leave to amend.

12
13 DATED: April 3, 2017

CALDWELL LESLIE & PROCTOR, PC
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